Observer & Eccentric Newspapers, Inc. ***and*** **Anne Grabda.** Case 7–CA–44695

September 11, 2003

DECISION AND ORDER

BY MEMBERS LIEBMAN, SCHAUMBER, AND WALSH

On September 3, 2002, Administrative Law Judge Arthur J. Amchan issued the attached decision. The Respondent and the General Counsel each filed exceptions, supporting briefs, and answering briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs,[1] affirms the judge's rulings, findings,[2] and conclusions, except as discussed below, and adopts his recommended Order.

For the reasons stated by the judge, we affirm his conclusion that the Respondent did not violate Section 8(a)(3) and (1) of the Act when it laid off employee Anne Grabda in December 2001. For the reasons stated below, we adopt the judge's finding that the Respondent violated Section 8(a)(1) of the Act by the interrogation of employee Donna Gregway. However, we find it unnecessary to pass on the legality of Anne Grabda's interview because the finding of an additional violation would be cumulative and would not affect the remedy.

In February 2000, Respondent laid off employees Jean Podrasky[3] and Linda Egnatowski. Podrasky and Egnatowski subsequently filed a civil lawsuit against the Respondent alleging both age discrimination and wrongful discharge based on their activity in an unsuccessful 1997 union campaign. In the course of investigating the allegations in the lawsuit, and after Podrasky mentioned in her deposition that Grabda and Gregway had supported the Union during the 1997 organizing campaign, the Respondent attorney's, Mark Heusel, decided to interview Grabda and Gregway. In August 2001, the Respondent's human resources manager, Lisa Gorno, called Gregway into her office and told her that Heusel wanted to talk to her about the lawsuits. Gregway, expressing her reluctance, asked, "D[o] I have to really do this?" Gorno responded, "It's really no big deal." Heusel, along with Gorno, then interviewed Grabda and Gregway. Each employee was interviewed separately and was asked about Podrasky and Egnatowski's union activity prior to their layoff.

Heusel asked Gregway why the employees were trying to start a union. Gregway responded, because "we were unpaid [sic] and we were tired of the way we were treated." Heusel then asked whether employees were still talking about the union. Gregway said, "yes." In response, Gorno exclaimed, "What! We're still talking about the union?" Again, Gregway said, "yes." At the conclusion of the interview, Gorno once again asked Gregway: "Are they still talking about the union." Gregway, for a third time, responded, "yes."

The judge found that, although the interview of Gregway pertained to a private civil lawsuit, the Respondent was obligated to comply with the interview standards set forth in *Johnnie's Poultry*[4] because the lawsuit pertained to protected activities of the potential employee witnesses who were interviewed. The judge also found that neither Heusel nor Gorno made it clear to Gregway that participation in the interview was voluntary and that no retaliation would occur if she declined to be interviewed or gave responses unfavorable to the Respondent. The judge therefore concluded that the Respondent, through Heusel and Gorno, violated Section 8(a)(1) by unlawfully interrogating Gregway.

The Respondent excepts to this finding, arguing, inter alia, that *Johnnie's Poultry* does not apply to this situation, but even if it does, the Respondent complied with the requirements of that decision. The Respondent also

[1] The General Counsel filed a motion to strike both the affidavit of Lisa Gorno, attached as Exh. 2 to the Respondent's brief in support of its exceptions, and references to the affidavit in the Respondent's brief. The Respondent filed a motion in opposition to the motion to strike. We agree with the General Counsel that Gorno's affidavit was not introduced as evidence at the hearing and cannot be introduced into the record at this point. See Sec. 102.45(b) of the Board's Rules and Regulations. Accordingly, we grant the General Counsel's motion to strike Gorno's affidavit and references thereto from the Respondent's brief. *S. Freedman Electric, Inc.*, 256 NLRB 432 fn. 2 (1981).

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

The General Counsel excepts to the judge's failure to rule on a motion to strike portions of the Respondent's posthearing brief to the judge referring to Attorney Mark Heusel's notes in support of the Respondent's argument that Donna Gregway was not a credible witness regarding what occurred during Heusel's interview of her. The judge found Gregway to be credible, and we affirm that credibility determination. Therefore, we find it unnecessary to pass on the General Counsel's exception. Moreover, under Sec. 102.45(b) of the Board's Rules and Regulations, posthearing briefs to an administrative law judge are not part of the record before the Board, and therefore there is no need for us to strike the language at this juncture.

[3] We have corrected the judge's misspelling of Podrasky's name.

[4] 146 NLRB 770, 775 (1964), enf. denied on other grounds 344 F.2d 617 (8th Cir. 1965).

argues that Gregway's interview was not unlawful when considered under the totality of the circumstances.

We find that the Respondent unlawfully interrogated Gregway under the totality-of-the-circumstances test set out in *Rossmore House*.[5] Consequently, we find it unnecessary to pass on whether the safeguards set out in *Johnnie's Poultry* are also applicable here. See *EPI Construction*, 336 NLRB 234, 241 (2001).

The expressed purpose of the meeting with Gregway was to obtain information about past activities relevant to the lawsuit brought by Podrasky and Egnatowski. However, Heusel and Gorno went beyond the expressed purpose and raised the issue of employees' current union activity.[6] In addition, they repeatedly questioned Gregway about this matter. Indeed, they asked her not once, but three times, whether employees were still talking about the Union, and they specifically questioned her about why employees were trying to start a union. Contrary to our dissenting colleague's claim, the evidence plainly shows that the Respondent questioned Gregway about union activity several times and, therefore, that our characterization of the questioning as "repeated" is entirely appropriate. As our dissenting colleague himself concedes, Heusel and Gorno had no legitimate reason for this line of questioning, as it was irrelevant to the Respondent's investigation of the claims made in the civil lawsuit.

Further, it is well settled that an employer violates Section 8(a)(1) of the Act by interrogating an employee about other unnamed employees' union activity or sentiments.[7] Contrary to our dissenting colleague's claim, the fact that Heusel and Gorno did not question Gregway about her own union sympathies, or those of another specific employee, does not minimize the coercive nature of the interview. *Rossmore House*, supra, suggests that some factors, which may be considered in analyzing allegedly unlawful interrogations are, inter alia, the nature of the information, sought, the identity of the questioner, and the place and method of the interrogation. 269 NLRB at 1178 fn. 20. Here, two high-level Respondent officials initiated repeated questioning of a reluctant, nonopen union supporter about her fellow employees' union activity. The interrogation took place in the Respondent's conference room, and the information sought about current employee union activity was concededly irrelevant to the Respondent's civil lawsuit investigation. We find that the Respondent's interrogation of Gregway had a reasonable tendency to interfere with, restrain, and coerce her in the exercise of her protected rights under Section 7 of the Act, and thus this interrogation violated Section 8(a)(1) of the Act.[8]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Observer and Eccentric Newspapers, Inc., Detroit, Michigan, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

Dated, Washington, D.C. September 11, 2003

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Wilma B. Liebman, Member

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Dennis P. Walsh, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

[5] 269 NLRB 1176 (1984), affd. sub nom. *Hotel Employees Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985). It is appropriate to consider various factors in a *Rossmore House* analysis. See *Westwood Health Care Center*, 330 NLRB 935, 939–940 (2000).

[6] See *Custom Window Extrusions, Inc.*, 314 NLRB 850, 858–859 (1994) (finding unlawful interrogation based in part on fact that supervisor, not employee, raised issue of union activity); *Heartland of Lansing Nursing Home*, 307 NLRB 152, 154–156 (1992) (finding unlawful interrogation where "subject of renewed union activity . . . was raised by [supervisor]"). Contrary to our dissenting colleague's description of these cases, the particular interrogations to which we refer—the interrogation of employee Penman in *Custom Window* and the interrogation of employee Messenger in *Heartland of Lansing*—are quite similar to the interrogation of Gregway. Although the Board found additional violations in these cases, the relevant interrogations were clearly found to be separate violations, and not dependent on any of the other findings of violations, including, in *Custom Window*, a threat of plant shutdown in the same conversation. See 314 NLRB 850, 858, where this is made clear.

[7] See, e.g., *La Gloria Oil & Gas Co.*, 337 NLRB No. 177, slip op. at 4 (2002), enfd. mem. (Table No. 02-60705) (5th Cir. 2003); *Sumo Airlines*, 317 NLRB 383, 383 (1995); *Cumberland Farms, Inc.*, 307 NLRB 1479, 1479 (1992), enfd. 984 F.2d 556 (1st Cir. 1993).

[8] Our dissenting colleague's reliance on *Graham Architectural Products Corp. v. NLRB*, 697 F.2d 534 (3d Cir. 1983), and *Rossmore House*, supra, in reaching a different result, is misplaced. In *Graham*, low-level supervisors or management officials casually questioned open union supporters in open areas of the plant. In those circumstances, the court held that to find such conversations unlawful "ignores the realities of the workplace." 697 F.2d at 541. In contrast, here, Gregway was a reluctant witness, summoned to a private conference room for questioning by two high-level company representatives.

Likewise, in *Rossmore House*, the employee who was questioned was an open and active union supporter who had declared his union support in a mailgram to the employer. It was that mailgram that prompted the employer to ask him questions about his union activity. Gregway was not an open union supporter. Rather, as noted above, the Respondent learned of her union activity only through deposing Podrasky.

MEMBER SCHAUMBER, dissenting in part.

I respectfully dissent. I would find that the few short questions asked Donna Gregway by Attorney Mark Heusel and Human Resources Manager Lisa Gorno do not violate Section 8(a)(1) under the *Rossmore House* totality-of-the-circumstances test.[1]

I do not agree with the majority's characterization of what occurred here. Gregway was not "repeatedly questioned" about current union activity. On the contrary, in the context of a lawful pretrial interview she was matter-of-factly asked whether the employees were still talking about a union and why they wanted a union. These questions were obviously prompted by the earlier information given Heusel and Gorno by employee Anne Grabda that employees were still talking about a union. Grabda volunteered the information, and it is evident from the record that Heusel and Gorno were quite surprised by it. While the questions asked Gregway might have been irrelevant to the subject matter of the interview, under the circumstances I find them unobjectionable. Heusel and Gorno did not inquire into Gregway's union sympathies or sentiments. She was not asked about her Section 7 activities nor were the Section 7 activities of others disparaged. Similarly, the record does not support the majority's description of Gregway as "reluctant." Indeed, in describing these few brief questions, Gregway minimized their significance to her.

To conclude that under the circumstances the questions asked Gregway constitute coercive interrogation in violation of Section 8(a)(1) of the Act calls to mind the Third Circuit's cautioning remark in *Graham Architectural Products Corp. v. NLRB*, 697 F.2d 534, 541 (3d Cir. 1983), cited with approval in *Rossmore House*, 269 NLRB 1176, 1177 (1984):

> If Section 8(a)(1) of the Act deprived employers of any right to ask noncoercive questions of their employees during [a union] campaign, the Act would directly collide with the Constitution. What the Act proscribes is only those instances of true 'interrogation' which tend to interfere with the employees' right to organize.

Facts

The Respondent's officials informed Gregway that the purpose of the interview was to discover information relevant to the civil lawsuit brought by two former employees, Podrasky and Egnatowski. Concededly, the focus of the interview was on these former employees and their union activities in 1997, 3 years earlier, which they had alleged led to their wrongful discharge. Gregway's interview lasted 1/2 to 3/4 of an hour. All of the questions objected to in Gregway's interview, and the answers to them, could not have taken more than a minute's time to ask and answer.

In the interview of Gregway, although the transcript is a bit unclear, Heusel and Gorno asked three questions, one twice, regarding this current union activity. Gregway testified, "He [Heusel] was just asking if we were still talking about it [the Union] as of that date, August 10th, and I said, 'Yes. People are still talking about it.'" To which Gorno commented, "What! We're still talking about the Union?"[2] The second question Heusel asked was why the employees were trying to start a union. Gregway responded candidly, "We were underpaid and we were tired of the way we were treated." Finally, when Gregway got up to leave the room, Gorno asked her the same question she was asked earlier by Heusel, whether employees were still talking about the Union.

Analysis

I do not believe these few incidental questions, unaccompanied by any suggestion of hostility, can be viewed as a "true interrogation,"[3] coercive of Gregway's Section 7 activities. As mentioned above, Gregway was not asked about *her* union activities or sympathies. Gregway was asked whether employees were still talking about a union. Gregway accurately minimized the significance of the question and her answer when describing them in her testimony, stating in a matter-of-fact manner that Heusel "was just asking if we were still talking" about the Union, and she said "yes" they were. As to the second question asked, why employees wanted a union, again Heusel was not inquiring into Gregway's union sentiments, there is no evidence that the question was asked in a pejorative manner and, other than the fact that it, like the first question, was irrelevant to the purpose of the interview, it was entirely unobjectionable. Indeed, Gregway's candid response belies any suggestion that it tended to have a coercive effect on her Section 7 activities. In sum, Gregway was asked one question as to why the employees wanted a union, which was factual and unobjectionable, and two, Heusel and Gorno raised the issue of whether Gregway knew that employees were still talking about a union.

In *Rossmore House*, supra, the Board announced that it would no longer follow the line of cases culminating in

[1] I join my colleagues in affirming the judge's dismissal of the 8(a)(3) and (1) allegations involving the layoff of employee Anne Grabda. Like my colleagues, I also find it unnecessary to pass on the legality of Grabda's interview.

[2] Unlike my colleagues, while Gregway responded to it, I do not consider Gorno's comment a separate question but rather an observation and part and parcel of Heusel's preceding inquiry.

[3] *Graham Architectural Products Corp. v. NLRB*, supra at 541.

PPG Industries, 251 NLRB 1146 (1984), that held that employer questions concerning an employee's union sympathies, even when addressed to open and active union supporters in the absence of threats or promises, are inherently coercive." 269 NLRB at 1177. Instead, the Board will look at

> whether under all of the circumstances the interrogation reasonably tends to restrain, coerce, or interfere with rights guaranteed by the Act. Id.[4]

Since Heusel and Gorno did not inquire into Gregway's union sympathies or sentiments, her Section 7 activities, or the Section 7 activities of any particular employee when they asked her two general questions in a nonpejorative manner, I find the questions were unobjectionable. Consequently, I do not believe it is necessary to go any further. However, considering *Rossmore House*, the Board's finding there of no coercive interrogation fully supports a finding of no coercion here.

In *Rossmore House* itself, the employee notified the employer's manager by mailgram that he and another employee were forming a union organizing committee. Both the manager and employer's owner subsequently asked the employee about this message. According to the manager, he asked the employee if it was true and when being told that it was, he said, "Okay" and walked away. The employee called after him, "I am sorry; it is nothing personal." According to the employee, the manager asked, "What is this about a union." The employee replied, "That's right about the union. We're going to have a union because of the lack of benefits, lack of insurance, lack of job security, vacations without pay." The manager then responded that both the owners and he would fight the union effort, and the employee interjected that "it's nothing personal. We just want better conditions."

The next day, the owner approached the employee and stated, "The manager tells me you're trying to get a union in here," and he asked why. The employee responded that it was "because of the low pay, no benefits and lack of job security." The owner then asked if the union charged a fee to join. The owner was told that it did and he responded that he would talk to the manager about it.

[4] Even if the stringent per se rule followed in *PPG* were still the law, the questions asked Gregway could not be found to be coercive. Gregway was not asked about her union sympathies or her reasons for supporting a union. Compare *Paceco*, 237 NLRB 399 (1978), vacated in part and remanded in part 601 F.2d 180 (5th Cir. 1979), supp. dec. 247 NLRB 1405 (1980). She was asked simply whether employees were still talking about the union and why employees wanted a union. These harmless questions were incidental to a much longer interview on a different topic.

The Board found under either version of the first conversation nothing was said then or in the subsequent conversation that involved coercive interrogation in violation of Section 8(a)(1) of the Act. The majority's conclusion here cannot be squared with the Board's decision in *Rossmore House*.

Unlike Gregway, the employee in *Rossmore House* was asked about *his* Section 7 activities and he was asked about them multiple times. Gregway on the other hand was asked whether employees were talking about the union and why employees wanted a union. As with Gregway, the employee in *Rossmore House* was asked the questions in a matter-of-fact nonpejorative manner. The fact that Gregway's two questions were asked incidentally during a formal interview will not suffice to distinguish this case because the questions asked Gregway were substantively nonobjectionable.

My colleagues cite two other cases, *Custom Window Extrusions*, 314 NLRB 850, 858–859 (1994), and *Heartland of Lansing Nursing Home*, 307 NLRB 152, 155–156 (1992), where the Board found unlawful interrogations. These cases are factually distinguishable. Each involves probing employees about *their* union sympathies such as how they are going to vote, not general questions asked whether employees were still talking about a union and why employees wanted a union.

In *Custom Window Extrusions*, the employee was asked by a "high-level" supervisor, the company's vice president, to meet outside in private. The employee was then asked a series of questions as to *why the employee wanted the union*, how the union was doing and "*why [the employee] wanted the union in view of the pay cut that he would receive if the Union got in*." The conversation concluded with the vice president first asking the employee for a meeting with employees at the home of the company's president to blunt union organizing activity. Then the vice president said that management was afraid of what the majority shareholder "might do" if he learned about the union activity. When asked by the employee what "might do" meant, the vice president said that the shareholder might "shut the plant down."

In *Heartland of Lansing Nursing Home*, a series of employees were asked questions about *their union activities* far more significant than the two neutral questions about employee union talk and why employees want a union at issue here. For example, one employee was stopped in the hallway and asked if she had anything to do with the current union organizing activity because her name was being heard "all over the place." When the employee responded that she did not have anything to do with it, the director of nursing responded that she "was relieved" to hear that. Another employee was ap-

proached by the facility administrator in the dining room, handed anti-union literature and asked how she was going to vote in the election. She was then told that she did not really need a union and that if the employee had any problems she should bring them to the administrator. A third employee was asked by the regional manager how she was going to vote and during a conversation that lasted 10 minutes was told why she did not need a union and that any grievances she had should be brought to management. All of the above occurred in the context of instructions from a labor consultant retained by management to the facility's supervisors to "go out and talk to their employees, to report back who the union supporters were and to solicit from these employees their problems and complaints about their jobs." 307 NLRB at 154.

It was under these circumstances that the Board affirmed the judge's conclusions in *Custom Window Extrusions* and *Heartland of Lansing Nursing Home,* that under *Rossmore House* the questions asked the employees by a supervisor "reasonably tended to restrain, coerce and interfere with employees' rights guaranteed by Section 7 of the Act." *Heartland of Lansing Nursing Home*, supra. No such conclusion can be made here.

My colleagues suggest in absolute terms that it is "well settled" that under *Rossmore House* an employer's interrogation of an employee about other unnamed employees' union activity violates Section 8(a)(1). That is not correct as a reading of the cases cited by the majority in support of this broad proposition reveals. Each case involves coercive circumstances simply not present here. For example, in *La Gloria Oil & Gas Co*., 337 NLRB No. 177, slip op. at 4 (2002), enfd. mem. (Table No. 02-60705) (5th Cir. 2003), a supervisor asked an employee to come to his office for supplies. While the employee was in his office, the supervisor asked the employee if he would give him some information about the rumors he was hearing. The employee said it was not a good time to talk. The supervisor responded by calling another employee who was assisting the union in organizing a "son of a bitch." He said that he wished someone was able to "look [him] in the eye and tell [him] what's going on" and that "he was ready to kill someone over this." In what was described as a "disgusted" and "upset" manner, the supervisor said that if the drivers were doing what he thought they were doing "then they're going to fire everybody, including himself, and get rid of the trucks and trailers . . . and none of us would have a job anymore." 337 NLRB No. 177, slip op. at 1. This was followed with similar conversations by the supervisor with other employees.

CONCLUSION

In sum, the few questions asked Gregway, whether employees were talking about a union and why employees wanted a union, were substantively nonobjectionable. They were asked in a neutral and nonpejorative manner. They do not constitute an "interrogation" unlawful under the Act. On the contrary, they represent the kind of natural dialogue to be expected between employer and employee on a topic of mutual interest and fully protected by Section 8(c) of the Act. Accordingly, I would dismiss the Gregway interrogation allegation of the complaint.

Dated, Washington, D.C. September 11, 2003

Peter C. Schaumber, Member

NATIONAL LABOR RELATIONS BOARD

Amy J. Roemer and *Sarah P. Karpinen, Esqs.,* for the General Counsel.

Mark V. Heusel and *Dennis Devaney, Esqs. (Williams, Mullen, Clark & Dobbins),* of Toledo, Ohio, for the Respondent.

DECISION

STATEMENT OF THE CASE

ARTHUR J. AMCHAN, Administrative Law Judge. This case was tried in Detroit, Michigan on June 18–19, 2002. The charge was filed January 7, 2002, and the complaint was issued on March 29, 2002.

Respondent laid off the Charging Party, Anne Grabda, on December 10, 2001. The General Counsel alleges that Respondent violated Section 8(a)(3) and (1) of the Act in selecting her for layoff in retaliation for union activities. The General Counsel also alleges that Respondent violated Section 8(a)(1) of the Act by coercively interrogating several of its employees regarding union activities in August 2001, when conducting interviews of potential witnesses in a pending lawsuit.

On the entire record,[1] including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, the Observer and Eccentric Newspapers, Inc., a corporation, publishes community newspapers in the Detroit, Michigan area. It maintains an office in Livonia, a suburb of Detroit, where in 2001 it derived gross revenue in excess of $200,000 and published advertisements for a number of national retail stores. Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union, Newspaper

[1] Page 90, line 19 should read, "was not required" rather than "was required."

Guild of Detroit, Local 22, is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

In late 2001, Respondent was experiencing significantly declining revenues. As a result, it eliminated the jobs of 36 of its employees between December 7, 2001, and February 21, 2002. Nineteen of these employees worked in Respondent's editorial department. Five, including Anne Grabda, the Charging Party, worked in the Observer and Eccentric's (O & E) business office. The five business office employees were laid off on December 10, 2001. Four of the five employees who were laid off from the business office had relatively little seniority, ranging from 1 year to 6 and 2/3 years with the O & E. Grabda, however, had worked for the Company for over 15 years. Several employees with much less seniority were not laid off, most notably Debra Conner, an employee with less than 4 years of seniority, who had a job similar to Grabda's.

The essence of the alleged 8(a)(3) violation in this case is whether Respondent placed Grabda in a different job classification from Debra Conner for purposes of the layoff in order to retaliate against her for union activities.

Union Activity in the O & E's Business Office in 1997

In the spring and summer of 1997, a number of O & E business office employees met with representatives of the Newspaper Guild, a union that represented O & E's editorial department employees. Union meetings were held at the homes of business office employees Jean Podarsky, Donna Gregway, and Anne Grabda. Steve Pope, then the O & E's general manager, conducted meetings with employees to discourage them from organizing the business office. On September 12, 1997, Pope sent each employee a letter, the essence of which was "we do not need or want our non-union employees to be represented by a union."

On September 18, 1997, Craig Phipps, then O & E's controller, sent a memo (GC Exh. 3) to Pope and David Karapetian, then and now the vice president for human resources for O & E's parent company, Hometown Communications Network, Inc. (HCN). Phipps recommended a number of responses to the Union's organization drive, including the following:

> How can we stop this from happening on company time? This is not going to go away, but I think we need to firing [sic] Jean Podarsky NOW, the message needs to be sent that we will not stand for this kind of activity on our time. Our loyal employees have been telling us this and they are waiting for us to do something!

On October 14, 1997, Pope, Phipps, and Kim Mason-Welle, then O & E's human resource director, met with Podarsky. Pope told her that they had heard that Podarsky had been soliciting for the Union on company time and that she could lose her job if she continued to do so.[2] A few weeks later Podarsky went to Pope's office to talk to him and took Anne Grabda to the meeting as a witness. At this meeting Podarsky denied that she was soliciting for the Union at work.

In April 1998, Lisa Gorno began working at the O & E as human resources director. She apparently replaced Kim Mason-Welle, whose employment with O & E ended in February 1998. Sometime in 1998, during a discussion about a disciplinary write-up that Podarsky had received from her supervisor, Rosemary Gregory, Gorno asked Podarsky if there was still union activity going on in the business office.

The Podarsky/Egnatowski Lawsuit

General Manager Pope and Controller Craig Phipps ceased working for O & E in September 1999. Podarsky and another part-time business office employee, Linda Egnatowski were laid off in February 2000. Their supervisor, Rosemary Gregory, was laid off at the same time. Podarsky and Egnatowski filed a lawsuit against the O & E in the Wayne County (MI) Circuit Court alleging wrongful discharge. More specifically, Podarsky and Egnatowski alleged that they were discharged due to a perception that they supported unionization and were discriminated against on the basis of their ages.

In February 2001, Mark Heusel, O & E's counsel, deposed Podarsky and Egnatowski. During her deposition, Podarsky mentioned that some union meetings had been held at the home of Anne Grabda. She also mentioned the names of several other business office employees who were involved in the 1997 organizing drive. These included Donna Gregway and Lucy Caulford, both of whom worked for Respondent as of the date of the instant hearing. Lisa Gorno, Respondent's human resources director, was present at these depositions. An employee deposed by Podarsky's attorney, Eileen Lindeman, testified that Grabda had discussed the Union with her. Gorno was present at this deposition as well.

The August 2001 Employee Interviews

After deposing Podarsky and Egnatowski, and receiving their list of proposed trial witnesses, Respondent's counsel, Mark Heusel, informed Lisa Gorno that he wished to interview a number of O & E employees whose names appeared on that list. Gorno so informed the employees, including Anne Grabda, Donna Gregway, and Lucy Caulford. I find that neither Gorno nor Heusel made it clear to these employees that they could decline to be interviewed and that they would not experience retaliation on account of their answers or their refusal to be interviewed. Nevertheless, Caulford expressed "nervousness" about being interviewed and no interview was conducted with her.[3] During their interviews, Grabda and

[2] Respondent allowed, or at least tolerated, other nonwork related conversations during working hours, such as those relating to a football pool.

[3] I credit the testimony of Donna Gregway and Anne Grabda that they were not advised that they could decline to be interviewed and that they were not specifically assured there would be no retaliation against them. First of all, Mark Heusel's testimony regarding this subject is somewhat equivocal as to what he actually said to these employees. Heusel concedes that he is not primarily an NLRA attorney and thus I find that he probably was unaware of the requirements set forth in *Johnnie's Poultry*, 146 NLRB 770 (1964), regarding interviews of employees by counsel for their employer. Since Heusel cannot specifically recall whether or not he gave these assurances to Grabda and Gregway, I find that it is unlikely that Lisa Gorno can recall whether he

Gregway told Heusel that business office employees were still discussing unionizing.[4]

Anne Grabda's Employment With Respondent

Anne Grabda began working for O & E in 1986. Since 1990, she has been a credit collection clerk—approving or disapproving credit for advertisers and insuring that they pay Respondent. In May 2000, Respondent separated the handling of network or national advertising accounts from that of local business accounts. The network or national accounts are those for national retail chains, such as Home Depot. Since May 2000, Network accounts have utilized a computer software system known as ACCESS; local trade accounts use a computer software system known as PBS. Grabda and Kay Davidge handled the local trade accounts and in May 2000, Deb Conner was assigned to handle the network accounts. Conner was the only credit clerk to receive training in the use of the ACCESS system.[5]

In September 2000, Grabda and Davidge's titles were changed from collector to collector/trade credit or collector/trade transient. Connor's title was changed to collector—trade credit/network sales sometime prior to July 2001.

In October or November 2001, Marsha Percefull, the vice president of HCN, hired Erin O'Dowd to be controller of the Observer and Eccentric. O'Dowd began work on November 19. Percefull told her that in light of Respondent's declining revenues, she was sure that O & E needed to eliminate some jobs. O'Dowd asked each employee in the business office to submit to her a description of the tasks they performed and how much time they spent on each task.[6] Afterwards, O'Dowd separated the employees into four categories: (1) cashier; (2) customer service; (3) collector for trade accounts; and (4) collector for network accounts. With Lisa Gorno's approval, O'Dowd decided to layoff five employees. She laid off three customer service representatives, one cashier, and one collector/credit clerk. Within each of the categories she established, O'Dowd laid off the least senior employee(s).

Since there were only two collector/credit clerks for trade accounts, Kay Davidge and Anne Grabda, O'Dowd laid off Grabda because she had less seniority than Davidge. She determined that Conner, who had far less seniority than Grabda, was in a different category for purposes of the layoff.

Analysis

Respondent Did Not Violate the Act in Laying Off Anne Grabda in December 2001

In order to prove a violation of Section 8(a)(3) and (1), the General Counsel must show that union activity or other protected activity has been a substantial factor in the employer's adverse personnel decision. To establish discriminatory motivation, the General Counsel must show union or protected concerted activity, employer knowledge of that activity, animus or hostility towards that activity and an adverse personnel action caused by such animus or hostility. Inferences of knowledge, animus and discriminatory motivation may be drawn from circumstantial evidence as well from direct evidence.[7] Once the General Counsel has made an initial showing of discrimination, the burden of persuasion shifts to the employer to prove its affirmative defense that it would have taken the same action even if the employee had not engaged in protected activity. *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981).

There is no question that Anne Grabda engaged in union activity and that by the time she was laid off Respondent was aware of this activity. Moreover, the record shows that Respondent bore considerable animus towards union activity on the part of employees in the O & E's business office. In this regard, I note that although Steve Pope, Craig Phillips, and Kim Mason-Welle were no longer employed by Respondent in December 2001, a number of management employees who worked for O & E or its parent company, HCN, in late 1997 and early 1998, were in the same or similar positions in December 2001. These include David Karapetian, vice president of human resources for HCN, who received the memo from Craig Phipps advocating the termination of Jean Podarsky for union activity, Jim Jimmerson, the O & E's operations manager, Marsha Percefull, vice president of finance for HCN and Lisa Gorno, the O & E's human resources director.

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did so—particularly, since her affidavit makes no mention of such assurances being given.

On the other hand, I credit Heusel's testimony over that of Donna Gregway and find that he told her that he was interested in finding out the facts regardless of whether they were "good or bad for the company," rather than telling Gregway that he wanted to find out whether she was "good or bad" for the Company. Since Heusel's objective was to gather as much information as he could from Gregway, his version of what he said is far more logical than Gregway's recollection.

[4] While Heusel testified that he did not ask any employees about their union activity, he did not specifically contradict Grabda and Gregway's testimony that in response to his questions they told him that discussions about unionizing were still occurring in the business office in 2001.

[5] Grabda testified that she requested training on ACCESS but was told either that there were no classes or that she would not be trained on this system. Grabda is not sure when she made this request and concedes that it may have been made prior to February 2001. Thus, there is no evidence that Respondent knew that Grabda had engaged in union activity when she requested ACCESS training. Therefore, providing such training to Connor and not Grabda could not have been part of an antiunion plan to get rid of Grabda at some later point on the basis of her lack of ACCESS training.

[6] The General Counsel asks that I draw an adverse inference from the fact that O'Dowd did not retain these questionnaires. Since Respondent was already in litigation concerning the Podarsky/Egnatowski layoffs, I would expect someone in O'Dowd's position to retain her November 2001 documents. Nevertheless, I decline to draw any inference adverse to the O & E on this basis. Grabda concedes that she responded to such a questionnaire. It is uncontroverted that unlike Grabda, Conner used and was trained in the ACCESS computer system. I conclude that my determination as to whether or not Respondent retained Conner rather than Grabda for legitimate or pretextual reasons is immaterially affected by the disappearance of these documents. Even without these questionnaires, there is sufficient evidence to determine whether or not the General Counsel has established that O & E's stated reasons for Grabda's layoff are pretextual.

[7] *Flowers Baking Co.*, 240 NLRB 870, 871 (1979); *Washington Nursing Home, Inc.*, 321 NLRB 366, 375 (1966); *W. F. Bolin Co. v. NLRB*, 70 F.3d 863 (6th Cir. 1995).

It is possible that animus towards those engaged in union activity in the business office still festered within Respondent's management. It is also possible that O'Dowd's decision to place Grabda and Connor in different categories for the purpose of layoff was a pretextual device to get rid of a union supporter during what the General Counsel concedes was generally a legitimate economic layoff. However, I find that the circumstantial evidence is insufficient to warrant drawing an inference of discriminatory motive. Therefore, I conclude that the General Counsel has not met his burden of establishing that Grabda's layoff violated the Act.

The record establishes that Connor was the only employee proficient in the use of the ACCESS billing system for network accounts and that no other employee could be quickly trained to take her place.[8] I therefore conclude that Respondent had a legitimate economic reason for differentiating Conner from Grabda and Davidge for purposes of the layoff. In this regard, it is very significant that the separation of network sales from trade and transient sales occurred almost a year and a half prior to the layoff. If Respondent separated these duties in order to set the stage for getting rid of Grabda, it would have had to do so with an amazing degree of foresight. I see no basis for concluding that this was the case.[9]

On the last page of his brief, the General Counsel argues that Respondent has offered no explanation for why Grabda was not offered an entry-level position, such as cashier. O'Dowd explained that she broke the business office into categories and selected employees for layoff only within these categories. There is no evidence that O'Dowd did this for discriminatory reasons related to union activity. Indeed, four of the five employees laid off in the business office had more seniority than the entry-level employees who were retained.[10] There is no evidence that any of those laid off, besides Grabda, had engaged in any protected activities.

Respondent and Its Counsel Violated Section 8(a)(1) in Conducting the Interviews of Employees in August 2001

Counsel's interviews of employees in August 2001, pertained to a private lawsuit, rather than an NLRB proceeding. However, I conclude that counsel and the O & E were obligated to comply with the *Johnnie's Poultry* decision because the lawsuit also pertained to protected activities of the potential employee witnesses who were interviewed. Counsel did not make it clear that participation in the interviews was voluntary and that no retaliation would occur if: 1) employees declined to be interviewed; or 2) gave responses unfavorable to the O & E during the interviews. Therefore, I conclude that Respondent, through counsel and Lisa Gorno, violated Section 8(a)(1) as alleged in paragraph 7 of the complaint.

Bill Johnson's Restaurants, Inc., 249 NLRB 155 (1980), cited by the General Counsel is distinguishable from the instant matter in that an unfair labor practice proceeding was pending when Johnson's attorney deposed it's employees in a civil action. However, the rationale of that decision is appropriately applied to the O & E. I agree with the judge in the *Bill Johnson's* case that:

> . . . where a [S]tate court assumes jurisdiction over a case arising out of a labor setting, its jurisdiction is carefully circumscribed and the [S]tate court's actions remain subject to implied restrictions dictated by the potential of interference with the national labor policy—restrictions that would not be present in suits arising from nonlabor related circumstances.

249 NLRB at 167.

When balancing the interests of O & E's employees to engage in activities protected by the Act with O & E interest in defending itself against the Podarsky/Egnatowski lawsuit, the equities clearly fall on the side of demanding compliance with *Johnnie's Poultry*—at least with regard to employees who are not plaintiffs. Respondent knew why it laid off Podarsky and Egnatowski. By taking the depositions of the plaintiffs, O & E could determine the basis for their claim of illegal discrimination.[11] Deposing or interviewing current employees could only reveal corroborative evidence for one party or the other. Given the relative value of the information likely to be derived from such employees, the interests of justice require that such interviews or depositions be conducted only with the informed consent of the employee(s).[12] Assuring that such interviews are consensual is best guaranteed by requiring compliance with the *Johnnie's Poultry* criteria.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

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[8] The General Counsel contends that Respondent was obligated to call Conner as a witness to establish this fact. I conclude that the testimony of Lisa Gorno, Erin O'Dowd, and Mary Ann Smith as to the complexity of the ACCESS system and the amount of training Conner had received and is still receiving was sufficient to prove that another employee could not have easily assumed Conner's job functions had she been laid off. This is particularly true since the General Counsel did not present any persuasive evidence that Grabda could quickly have acquired competence in performing Conner's tasks.

[9] I note that Grabda testified that Rosemary Gregory, who left the O & E in February 2000, displayed favoritism towards Conner based on their personal friendship. Conner was hired at a higher salary than Grabda and others were being paid. It may be that the assignment to the network accounts in May 2000, was also the result of such favoritism. Assuming that Conner's status in the business office was the result of some unfairness unrelated to Grabda's union activity, such favoritism does not violate the Act.

[10] See Exh. GC–6. Also I'd note that the General Counsel tried this matter almost exclusively on the theory that Grabda and Conner were placed in different categories for discriminatory reasons.

[11] After learning of the existence of the Craig Phipps' memo regarding Podarsky, counsel's task was largely a matter of showing that the antiunion animus of former management employees had nothing to do with the layoffs of Podarsky and Egnatowski.

[12] I would note that a deposition, as opposed to an interview by an employer's counsel, at least gives the employee the protection of a transcript in which it will be evident whether counsel did or did not go beyond the appropriate limits of inquiry.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[13]

ORDER

The Respondent, the Observer and Eccentric Newspapers, Inc., Livonia, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Coercively interrogating employees about their union activities and the union activities of other employees.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days after service by the Region, post at its Livonia, Michigan facility copies of the attached notice marked "Appendix."[14] Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since August 9, 2001.

(b) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. September 3, 2002

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT coercively question you about your union support or activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

OBSERVER & ECCENTRIC NEWSPAPERS, INC.

[13] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[14] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."